

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	
77204-s76H BY CHERYL AND CARL W.	)	FINAL ORDER
BALDWIN, JR.	)	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the June 10, 1992, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, restrictions, and limitations specified below, a Beneficial Water Use Permit is hereby granted for Application 77204-s76H by Cheryl and Carl W. Baldwin, Jr. to appropriate 101.31 gallons per minute (gpm) up to 81.93 acre-feet of the waters of an unnamed tributary of Silverthorn Creek for irrigation and 121.50 gpm up to 1.70 acre-feet per year for stock water at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 32, Township 9 North, Range 20 West, in Ravalli County by means of a headgate and ditch. The period of appropriation and diversion for stock water is from January 1 through December 31, inclusive of each year. The period of diversion for irrigation is from April 1

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through September 30, inclusive of each year. The places of use for the irrigation are 4.00 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and 20.00 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 32. The places of use for stock water are the E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 32.

1. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided by Montana law.

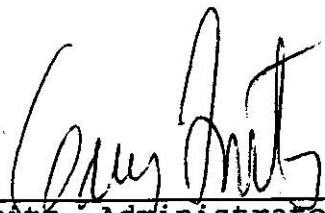
2. This permit is associated with claimed Water Right W36206-76H. When combined, the flow rate appropriated under this Permit shall not exceed 101.31 gallons per minute and the volume shall not exceed 81.93 acre-feet per year or that amount of water that can be beneficially used with Water Right W36206-76H.

3. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 9 day of July, 1992.

  
\_\_\_\_\_  
Gary Friez, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

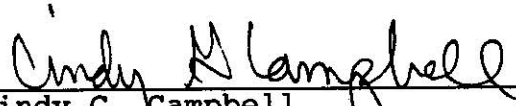
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 9<sup>th</sup> day of July, 1992 as follows:

Cheryl & Carl W. Baldwin, Jr.  
3529 Salish Trail  
Stevensville, MT 59870

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

  
\_\_\_\_\_  
Cindy G. Campbell  
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )     PROPOSAL FOR DECISION  
77204-s76H BY CHERYL AND CARL W.     )  
BALDWIN, JR.     )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 2, 1992, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Cheryl and Carl W. Baldwin, Jr. for the above-entitled Application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4).

APPEARANCES

Applicants Cheryl and Carl W. Baldwin, Jr. appeared at the hearing by and through Carl W. Baldwin, Jr.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Objector Thomas H. Swisher did not appear at the hearing. The record shows a properly constituted Notice of Hearing was served upon all parties on April 28, 1992, by certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1991). Return receipts were received by the Department, each with a signature indicating receipt. The Hearing Examiner received no communication from Mr. Swisher prior to the hearing or subsequent thereto. Therefore in accordance with Mont. Admin.

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R. 36.12.208, Mr. Swisher is in default and no longer retains status as a party in this matter.

#### EXHIBITS

Applicants submitted one exhibit which was accepted into the record without objection.

Applicants' Exhibit 1 is a hand-drawn map showing the location of three 160 acre parcels of land and the owners of each parcel, Skaggs Creek, Silverthorn Creek, and the proposed source which is called Middle Creek by the Applicants. The slope of the land is also shown.

The Department file was made available for review by all parties who had no objection to any part of it; therefore the Department file is accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

#### FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302 (1991) states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of a diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the Department."

2. Cheryl and Carl W. Baldwin, Jr. duly filed the above-entitled Application with the Department on February 7, 1991. (Department file.)

3. Pertinent portions of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on September 18, 1991. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application.

One timely objection to the Application was received by the Department. Applicants were notified of the objection by a letter from the Department dated December 23, 1991. (Department file.)

4. Applicants seek to appropriate 121.50 gallons per minute (gpm) up to 86.60 acre-feet of the waters of an unnamed tributary of Silverthorn Creek for irrigation and 121.50 gpm up to 1.70 acre-feet per year for stock water at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 32, Township 9 North, Range 20 West, in Ravalli County<sup>1</sup> by means of a headgate and ditch. The proposed period of appropriation and diversion for stock water is from January 1 through December 31, inclusive of each year. The proposed period of diversion for irrigation is from April 1 through September 30, inclusive of each year. The proposed places of use for the irrigation are 4.00 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and 20.00 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 32. The proposed places of use for stock water are the E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 32. (Department file.)

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<sup>1</sup>Unless otherwise specified, all land descriptions in this Proposal for Decision are located in Township 9 North, Range 20 West, in Ravalli County.

5. The proposed source is a spring-fed perennial stream that originates on the property of Baldwin Land Partnership, flows into Applicants' property then goes into a slough that covers approximately 4.00 acres on Applicants' property. The slough dries up in August most years. This stream does not have a surface connection to Silverthorn Creek. Applicant measured the flow of this stream on January 17, 1991, at 6.02 miner's inches; the flow was 10.83 miner's inches on February 1, 1991; the flow was 9.03 miner's inches on May 1, 1991; the flow was 10.83 miner's inches on October 1, 1991; and on June 1, 1992, the flow was 5.60 miner's inches. (Testimony of Carl Baldwin, Jr., Department file and Applicants' Exhibit 1.)

6. The proposed means of diversion is a headgate which would allow water to enter an existing ditch system for flood irrigation which has been in existence for many years. Some years the proposed appropriation would supplement the Silverthorn Creek water claimed by Statement of Claim W36206-76H with a claimed priority date of 1884, and other times it will be used alone for the irrigation of the proposed place of use. (Testimony of Carl Baldwin, Jr. and Department file.)

7. There are no other water rights on this source. (Testimony of Carl Baldwin, Jr.)

8. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved with which the proposed appropriation would unreasonably interfere. (Testimony of Carl Baldwin, Jr. and Department file.)

9. Applicants own the proposed places of use. (Testimony of Carl Baldwin, Jr., Applicants' Exhibit 1, and Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 2 and 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or



developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

. . .  
(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed uses of water, irrigation and stock water, are beneficial uses of water. Mont. Code Ann. § 85-2-102(2).

5. The Applicants have provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use. However, Applicant provided evidence that only 9.03 miner's inches are available during the period in which the Applicants seek to appropriate. The requested 10.83 miner's inches was shown to be available in February and October, both outside the proposed period of diversion. See Finding of Fact 4 and 5.

6. The Applicants have provided substantial credible evidence the water rights of a prior appropriator will not be adversely affected by the proposed project. See Findings of Fact 5 and 7.

7. The Applicants have provided substantial credible evidence the proposed means of diversion, construction, and

operation of the appropriation works are adequate. See Finding of Fact 6.

8. The Applicants have provided substantial credible evidence the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 8.

9. The Applicants have provided substantial credible evidence they have possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 9.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

#### PROPOSED ORDER

Subject to the terms, restrictions, and limitations specified below, a Beneficial Water Use Permit is hereby granted for Application 77204-s76H by Cheryl and Carl W. Baldwin, Jr. to appropriate 101.31 gallons per minute (gpm) up to 81.93 acre-feet of the waters of an unnamed tributary of Silverthorn Creek for irrigation and 121.50 gpm up to 1.70 acre-feet per year for stock water at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 32, Township 9 North, Range 20 West, in Ravalli County by means of a headgate and ditch. The period of appropriation and diversion for stock water is from January 1 through December 31, inclusive of each year. The period of diversion for irrigation is from April 1 through September 30, inclusive of each year. The places of use for the irrigation are 4.00 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and 20.00

acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 32. The places of use for stock water are the E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 32.

1. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided by Montana law.

2. This permit is associated with claimed Water Right W36206-76H. When combined, the flow rate appropriated under this Permit shall not exceed 101.31 gallons per minute and the volume shall not exceed 81.93 acre-feet per year or that amount of water that can be beneficially used with Water Right W36206-76H.

3. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

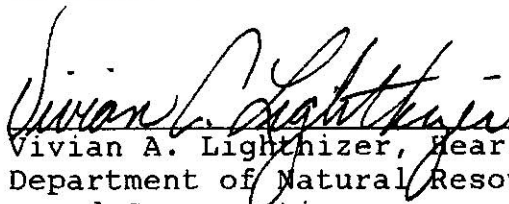
#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered. The defaulted objector is restricted to excepting to the default

ruling. The Department will disregard any exceptions submitted by the defaulted objector on other substantive issues.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 10<sup>th</sup> day of June, 1992.

  
Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6625


CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 10<sup>th</sup> day of June, 1992 as follows:

Cheryl & Carl W. Baldwin, Jr.  
3529 Salish Trail  
Stevensville, MT 59870

Thomas H. Swisher  
P.O. Box 690  
Barrow, AK 99723

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

  
Cindy G. Campbell  
Hearings Unit Legal Secretary